Filed 9/4/19 P. v. Miranda CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ANDREW MIRANDA, Defendant and Appellant.	C083362 (Super. Ct. No. 16FE002154)

Defendant Andrew Miranda stands convicted of committing domestic violence and he appeals. He contends (1) the trial court abused its discretion by admitting evidence of an uncharged act of domestic violence; (2) the court committed prejudicial error by misstating the facts in an oral jury instruction; (3) the prosecutor committed misconduct by making the same misstatement in his closing argument, or, alternatively, defense counsel rendered ineffective assistance by not objecting to the prosecutor's

statement; and (4) the court abused its discretion by not striking any of defendant's prison priors.

We disagree with defendant's contentions and affirm the judgment.

FACTS AND PROCEEDINGS

The Domestic Violence

Rosemarie S. lived in a studio apartment in a rehabilitation residence. She and defendant had been in a relationship off and on for about five years. Around 7:00 p.m., January 30, 2016, they were at her apartment, arguing. They had been arguing throughout the day. They often accused each other of infidelity.

As Rosemarie stood up from the couch, defendant came out of the bathroom and hit her on the side of her face with his fist. Rosemarie fell back onto the couch, breaking it. She bled from her nose, and defendant gave her a towel. They sat on the couch together for about 45 minutes. Rosemarie pretended everything was fine, but she wanted defendant to leave. She did not call 911 because she had no phone and she did not want to make matters worse.

Rosemarie asked defendant to walk with her to a nearby hospital to get an ice pack. She tried to make "everything seem calm." She got an ice pack at the front desk. She did not want to tell the nurse what had happened because defendant was there. Defendant seemed worried she might tell someone he had hit her, but he calmed down after she reassured him she was not going to call the police.

The two left the hospital and went back to Rosemarie's apartment. Rosemarie went outside to smoke a cigarette with her friend, and defendant stayed inside the apartment. Rosemarie went inside the friend's apartment and told her what had happened. The friend, and eventually Rosemarie, went to the residence's office, known as the hub, and asked someone to call 911. A counselor called 911 and told the operator a resident was assaulted by her boyfriend.

Rosemarie spoke with the 911 operator. She said defendant hit her in the face and he would not leave her room. She did not need medical attention, but she wanted someone to come and get defendant. During the call, Rosemarie asked someone in the hub if the windows were breakable. She told the operator, "I don't feel safe in here." She continued, "But you don't know him. He'll break the windows. He'll do everything he can to get to me. And he won't leave." Rosemarie asked the operator if the police were on their way and if they were close to arriving. She said she was afraid defendant would see her talking on the phone and try to break in.

Deputy Sheriffs Nathan Jennings and William Vernon arrived at the residence office. Rosemarie was frightened and upset. She did not want the deputies to tell defendant she was in the hub. The deputies went to her apartment and detained defendant without incident.

Defendant seemed "highly intoxicated." He had red, watery eyes, slurred speech, and balance problems. He said he and Rosemarie were in a dating relationship. He was staying with her, and they had been drinking beer and wine that night. He told Deputy Jennings that whatever Rosemarie told them was the truth.

Deputy Vernon met with Rosemarie. She was crying, shaking, and upset—"everything that you would equate with somebody who just had been attacked." She held a cloth over her face which was bloody from a laceration over her left eye.

Rosemarie said defendant had been drinking and yelling, accusing her of sleeping with other men. Defendant struck her in the face, and after a few minutes, they both went to the hospital. She allowed defendant to accompany her because if he thought she would call the police, in her words, " 'That would be it for me.' " She left the apartment when she realized defendant was not going to leave.

Fire personnel took Rosemarie to the hospital, where she received a few stitches in the laceration above her left eye. Photographs showed the laceration and a black eye.

Less than two hours after his arrest, defendant called Veronica S. from jail. Veronica and defendant were in a relationship from 1999 until 2013. They renewed the relationship in 2014 even though Veronica knew defendant was seeing Rosemarie, and they were in a relationship when defendant was with Rosemarie in January 2016. Veronica and defendant were married on May 20, 2016, nearly four months after the charged attack and before trial began on September 8, 2016.

On the phone call from jail, defendant told Veronica, "[S]he's locked me up." He said, "I blew it with her and I'm in county jail. She's got me for domestic violence again." He asked Veronica to call his mother and tell her he "blew it," and it was "her fault . . . ." Veronica replied, "No, I won't 'cause it's your fault." Defendant asked her to call his mother, ask for her help, and tell her he was "locked up and she needs to call [Rosemarie] [¶] . . . [¶] [T]ell my mom to call her and I'm in Sacramento County, I'm in um – Sac, I'm all drunk um . . . ." Veronica told defendant, "Nobody's gonna help you. [¶] . . . [¶] You did this to yourself." Defendant again asked her to call his mother and tell her he "blew it . . . [¶] . . . [¶] . . . with that girl. I hit her. I hit her and I'm in trouble."

Uncharged Criminal Acts

The prosecution presented evidence of three uncharged acts of domestic violence by defendant.

1. *Uncharged Act Involving Veronica in 2003*

On May 21, 2003, Veronica and defendant were living together in a studio apartment. At trial, Veronica did not recall defendant assaulting her on that day. At that time, she was a "very severe meth addict" and smoked meth daily.

Veronica did remember that defendant rode with her to work that day in her car. When she got out of the car at her work, defendant drove off in her car. She called the

police because she was "very upset" that defendant took her car. She remembered police coming to her work, but she did not remember telling them defendant took her car.

Elbert Rivera, a deputy sheriff who responded to Veronica's call, testified that Veronica told him she and defendant had a heated argument about finances. Defendant kicked her in the back as she came out of the bathroom. He grabbed her by the neck, covered her mouth, threw her onto the bed, and began choking her. He said, "You're going to die, bitch," and she thought she would die. She began losing consciousness, and when she came to, defendant was trying to give her CPR. He told her, "Breathe through your nose, bitch," and not to make a scene. Defendant picked up a wooden bat and walked around the room. Veronica felt intimidated, as if defendant was controlling her every movement.

Veronica told Deputy Rivera that defendant went with her when she drove to work. When she got there, defendant jumped into the driver's seat and drove off in her car. He told her he was going to a friend's house. Veronica then called the police. She told Deputy Rivera she feared for her safety. She had a swollen lip and she complained of pain to her throat, but Deputy Rivera did not see any visible injury to her neck. She declined medical treatment. She did not appear to be under the influence.

On December 12, 2003, defendant was convicted of violating Penal Code section 273.5, subdivision (a), infliction of corporal injury on a cohabitant where Veronica was the victim. Veronica testified at the preliminary hearing in that case. She asked for a "peaceful contact order."

There was confusion at the current trial over whether this 2003 conviction was based on the 2003 incident just described or on a different incident that occurred in 2002. We discuss this discrepancy below.

2. *Uncharged Act Involving Linda C. in 2011*

On September 2, 2011, defendant was convicted of violating Penal Code section 273.5, infliction of corporal injury on a cohabitant where Linda C. was the victim.

3. *Uncharged Act Involving Rosemarie in 2014*

In 2014, defendant confronted Rosemarie when she came back to her homeless camp with another friend. He thought she was going to "mess around" with the friend. He said to her, "What's wrong with you? Where you at? Where you been?" As she turned around to get her bike, he struck her on the back of her head with a beer bottle. She got a bump on the back of her head, but she did not seek medical attention. At the time, she was homeless and on drugs, and she did not pay attention to her injury.

Police Officer Raymond Barrantes took Rosemarie's statement about the incident. Rosemarie said defendant walked up to her from behind and called her names. Rosemarie thought defendant was drunk and told him to leave her alone. As she walked away, she was struck on her head with an empty beer bottle. She ran to an apartment where she had started residing, closed the door, and called 911. While she was talking to the operator, defendant banged on the door and asked her to let him in. He said he was thirsty. He gave Rosemarie a beer bottle and asked her to fill it with water. She filled it, so he would not know she was on the phone with police.

Officer Barrantes said Rosemarie appeared to have been crying when he arrived. He saw a quarter-sized lump on her head. Defendant was intoxicated and holding a glass beer bottle.

On July 11, 2014, defendant was convicted of violating Penal Code section 273.5, subdivision (a), infliction of corporal injury on a cohabitant where Rosemarie was the victim.

Expert Testimony

David Cropp, a former police detective, testified as an expert on domestic violence. He explained to the jury a pattern, known as the "cycle of violence," often seen between abusers and their victims. The pattern starts with a tension-building phase, escalates to an acute, abusive episode, then deescalates to a "honeymoon" or contrition phase.

Cropp stated it is common within the criminal justice system for victims to refuse to cooperate with an investigation or prosecution into the abuse and to recant their earlier statements. They may recant because they love the abuser and, particularly during the honeymoon phase, hope for a brighter future. They may also recant out of fear. Hoping to reunite the relationship, victims may not cooperate by saying they do not remember the events.

It is common for victims of abusers to act counterintuitively. For example, they may return to the relationship or not call 911. They may not want the abuser to go to jail, or they may not want to generate a law enforcement response that could produce more fear or retaliation. They may also not want to leave the relationship due to children or the inability to support themselves financially.

Cropp stated domestic violence is a "learned behavior." Once learned, it becomes something a person may default to as a way of behaving with intimate partners or other people. This is common for both the abuser and the victim. It is also possible for one who was convicted of domestic violence in the past to be falsely accused in the future.

Defense

Defendant testified he did not hit Rosemarie in 2016. He stated that around 6:00 p.m. that evening, he told Rosemarie he was going to leave. Rosemarie asked him not to leave, but they did not argue. She got off the bed and stood in front of the bathroom

door. After defendant opened the front door, Rosemarie suddenly grabbed the bathroom door and slammed it into her head. The edge of the door hit her above her left eye.

Defendant admitted he was convicted of domestic violence in 2003, 2011, and 2014, but he denied committing the acts on which those convictions were based. He pleaded guilty to them for extraneous reasons.

Judgment

The jury found defendant guilty of inflicting corporal injury on a person with whom he had a dating relationship. (Pen. Code, § 273.5, subd. (a).) It found defendant had a prior conviction for inflicting corporal injury upon a cohabitant (Pen. Code, § 273.5, subd. (f)(1)), but it found a great bodily injury allegation not to be true.

At a bifurcated trial, the trial court found defendant had served four prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).

The court sentenced defendant to state prison for an aggregate term of nine years: five years for the corporal injury and one year for each of the four prior-prison-term enhancements.

DISCUSSION

I

Admission of 2003 Uncharged Acts

Defendant contends the trial court abused its discretion in admitting evidence of the 2003 uncharged assault against Veronica. The court admitted the evidence under Evidence Code section 1109 as admissible propensity evidence of prior domestic violence. (Statutory section references that follow are to the Evidence Code unless otherwise stated.) Although the prosecutor did not request it, the court also stated the evidence would be admissible under section 1101 as evidence relevant to establishing defendant's criminal intent.

Defendant claims the trial court erred in admitting evidence of the 2003 attack under section 1109 because it applied an incorrect standard of prejudice for determining whether section 1109's presumption against admitting propensity evidence more than 10 years old was overcome.

He also asserts the court abused its discretion in admitting the evidence under section 1101 because it did not properly weigh the evidence's prejudicial impact under section 352, as section 1101 required it to do. Defendant claims the errors were prejudicial. We disagree with his contentions.

A. *Section 1109*

Section 1109, subdivision (a)(1), authorizes a court hearing a criminal action involving domestic violence to admit evidence of the defendant's commission of other domestic violence if the evidence is *not unduly prejudicial* under section 352. Subdivision (e) of section 1109 contains an exception to subdivision (a)'s rule of admissibility. Under subdivision (e), evidence of domestic violence that occurred more than 10 years before the charged offense is inadmissible under section 1109 "unless the court determines that the admission of this evidence is in the *interest of justice*." (Italics added.) "Thus, while evidence of past domestic violence is presumptively admissible under subdivision (a)(1), subdivision (e) establishes the opposite presumption with respect to acts more than ten years past." (*People v. Johnson* (2010) 185 Cal.App.4th 520, 537, fn. omitted (*Johnson*).)

Defendant claims that under *Johnson*, a trial court, when determining whether admitting the older acts of domestic violence is in the interest of justice, must apply a more rigorous standard of prejudice for admitting the evidence than that of undue prejudice found in section 352. He asserts the trial court erred here because it applied only the section 352 standard to determine the 2003 incident was admissible. Had it applied the correct standard, it would not have admitted the evidence.

Defendant misreads *Johnson*. In effect, *Johnson* held that a trial court must ask a different question when admitting older domestic violence acts, not necessarily apply a more stringent standard of prejudice. At issue is whether admitting the evidence is in the interest of justice, and the trial court may answer that question by applying the test of undue prejudice under section 352. We quote from *Johnson* at length: "We do agree with defendant . . . that some greater justification for admissibility is necessary under [section 1109,] subdivision (e) than under section 352. Balancing under section 352 is required even under subdivision (a), where the presumption runs in favor of admission. By including a specific 'interest of justice' requirement under subdivision (e), the Legislature must have intended to require a more rigorous standard of admissibility for remote priors.

"That having been said, the 'interest of justice' requirement obviously was not intended to present an insurmountable obstacle to admission of more remote prior conduct. *Nor do we think subdivision (e) necessitates an inquiry different in kind from that involved in a determination under section 352.* The section 352 balancing approach gives consideration to both the state's interest in a fair prosecution and the individual's constitutional rights. We believe this same type of analysis is appropriate for the 'interest of justice' exception under subdivision (e).

"*To the extent a higher degree of scrutiny is called for, it is the conclusion drawn from the balancing test, not the process itself, that must change under subdivision (e).* Under subdivision (a)(1) and section 352, evidence may be excluded only where its probative value is 'substantially outweighed' by its prejudicial effect. Though it reversed the presumption in subdivision (e), we believe the Legislature intended to allow admission of evidence whose probative value weighs more heavily on those same scales.

"Thus, the 'interest of justice' exception is met where the trial court engages in a balancing of factors for and against admission under section 352 and concludes, as the trial court did here, that the evidence was 'more probative than prejudicial.' While we

need not and do not hold this is the only means by which the 'interest of justice' finding may be justified, we certainly find the statutory prerequisite for admissibility was met in this case." (*Johnson, supra,* 185 Cal.App.4th at pp. 539-540, italics added.)

The trial court here applied the correct test. It recognized it was required to answer a different question to determine whether to admit evidence of the 2003 attack, and it answered that question in the manner *Johnson* held it could; by applying section 352 to conclude that admitting the evidence was in the interest of justice.

Defendant contends the trial court abused its discretion when it determined admitting the evidence was not unduly prejudicial under section 352 and thus in the public interest. He claims the 2003 incident was too dissimilar to be probative of the 2016 incident. There was no evidence the earlier incident involved drugs or alcohol, and the attack itself—kicking Veronica in the back, grabbing her neck, throwing onto the bed, and chocking her—was significantly different than his single strike against Rosemarie with his fist. Despite these points, the trial court did not abuse its discretion.

"Under Evidence Code section 352, the court has discretion to exclude relevant evidence ' "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." ' (*Robinson v. Grossman* (1997) 57 Cal.App.4th 634, 647.) ' "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' " ' (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) Relevant factors in determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and

punished for the prior offense(s). [Citations.]" (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.)

Despite the differences between the 2003 attack and the charged crime, we cannot say the trial court abused its discretion in admitting evidence of the older incident. No doubt the 2003 incident was more inflammatory—defendant attempted to kill Veronica by strangling her, and he said as much. But other similarities between the two attacks support the trial court's decision.

In both incidents, defendant exerted a degree of dominance and control after assaulting the victims. In 2003, he walked around the room holding a small bat. In 2016, his close presence prohibited Rosemarie from informing the hospital what happened or taking other actions to report the incident.

The 13-year gap between the two incidents is significant, but not dispositive against admitting the 2003 evidence when viewed in context. Defendant spent a significant amount of that time in custody. In 2003, he was sentenced to two years in state prison for a 2002 incident involving Veronica. In 2007, 2008, and 2010, he violated his parole. In 2011, he was sentenced to two years in state prison for his crime against Linda C. In 2014, he was sentenced to four years in state prison for his crime against Rosemarie. In 2016, while on parole, he committed the charged crime.

Also, evidence of the 2003 uncharged act was probative because it involved a different victim. Evidence that defendant committed prior acts of domestic violence against two women showed a pattern of abuse and his propensity to commit domestic violence. Plus, the danger of fabrication was reduced because the uncharged acts involved different women. (*Johnson, supra,* 185 Cal.App.4th at p. 533.)

The trial judge expressly found that testimony regarding the 2003 incident would not result in an undue consumption of time. And even though defendant's 2003 conviction for domestic violence was likely based on his 2002 conduct against Veronica, the jury was told, without elaboration, that he was convicted in 2003 of corporal injury on

a cohabitant where Veronica was the victim. As a result, there was no risk the jury may have been tempted to punish defendant for the 2003 uncharged act because it was told he had a 2003 conviction for corporal injury on a cohabitant.

Because the court had credible and rational reasons for admitting the 2003 evidence under section 1109, we cannot hold that it abused its discretion in doing so.

B. *Section 1101*

Defendant argues the trial court abused its discretion by admitting evidence of the 2003 attack under section 1101 to show his intent and the absence of mistake or accident. He claims the court abused its discretion for the same reasons it abused its discretion admitting the evidence under section 1109. The evidence was unduly prejudicial because the conduct in the 2003 incident and the current one was not similar. We disagree.

"Evidence of uncharged crimes is admissible [under section 1101] to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.)" (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) "The least degree of similarity is required to establish relevance on the issue of intent. (*People v. Ewoldt, supra,* 7 Cal.4th 380, 402.) For this purpose, the uncharged crimes need only be 'sufficiently similar [to the charged offenses] to support the inference that the defendant " 'probably harbor[ed] the same intent in each instance.' [Citations.]" ' (*Ibid.*)" (*Kipp,* at p. 371.)

Additionally, "[t]he probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Ewoldt, supra,* 7 Cal.4th 380, 404-405.)" (*People v. Kipp, supra,* 18 Cal.4th at p. 371.)

The trial court did not abuse its discretion admitting the evidence under section 1101 for the same reasons it did not abuse its discretion under section 1109. Evidence of the 2003 incident was sufficiently like the 2016 incident to support a rational inference that defendant harbored the same intent for both, and its probative value was not substantially outweighed by its prejudicial impact.

C. *Prejudicial Error*

Assuming only for purposes of argument that the trial court abused its discretion admitting the evidence, we conclude any error was harmless. There is no reasonable probability defendant would have obtained a more favorable verdict had the court excluded evidence of the 2003 assault. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The evidence against defendant was strong even when not considering the 2003 attack. To establish defendant committed corporal injury, the People had to prove defendant willfully and unlawfully inflicted a physical injury on Rosemarie, the injury resulted in a traumatic condition, and defendant did not act in self-defense or defense of someone else. (Pen. Code, § 273.5, subd. (a).)

The evidence—without the 2003 uncharged attack—was more than enough to establish defendant's guilt. Rosemarie testified that defendant hit her with his fist. The strike left a laceration above her left eye and a black eye. She told the 911 operator that defendant hit her and would not leave her room. She was afraid defendant would see her talking on the phone. She did not "feel safe." She feared defendant would break the windows and "do everything he can" to get to her. She repeatedly asked the operator if the police were on their way. Officers who arrived at the scene described her as looking frightened and upset.

Defendant told the police that whatever Rosemarie told them was the truth. Less than two hours after his arrest, he admitted to Veronica he hit Rosemarie. He told Veronica, "I blew it with her" and that "[s]he's got me for domestic violence again." He

asked Veronica to let his mother know that he "blew it . . . [¶] . . . [¶] . . . with that girl. I hit her. I hit her and I'm in trouble."

Defendant had been convicted of inflicting corporal injury on Rosemarie before, in 2014, and on a woman named Linda C. in 2011. Thus, even if the court had not admitted evidence of the 2003 assault, it still would have instructed that if the jury decided defendant committed those two uncharged acts, it could conclude defendant was "disposed or inclined to commit domestic violence" and "was likely to commit and did commit domestic violence, as charged here."

Moreover, the trial court correctly limited the jury's use of the uncharged crime evidence. It explained the limited purpose for which the jury could consider evidence of the uncharged acts. If the jury concluded defendant had "committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence." Evidence of defendant's uncharged offenses was "not sufficient by itself" to prove the charged crime, and the People had the burden of proving beyond a reasonable doubt that defendant committed corporal injury and the great-bodily-injury allegation. With no evidence to the contrary, we presume the jurors understood and followed the court's instructions. (*People v. Gray* (2005) 37 Cal.4th 168, 217; see *People v. Callahan* (1999) 74 Cal.App.4th 356, 372 [no abuse of discretion in admitting uncharged conduct evidence where there was no evidence the jury misunderstood the limited purpose of the evidence].)

Notwithstanding this evidence, defendant asserts he suffered prejudicial error. He contends the prosecutor immediately and repeatedly argued the 2003 attack and its details in his closing argument. According to defendant, the prosecutor falsely stated defendant was convicted for that conduct, yet he barely discussed the other two uncharged acts for which he was convicted. Defendant claims the prosecutor's focus on the uncharged acts implied a lack of confidence in the evidence supporting the charged offense.

The prosecutor's closing argument did not focus on the 2003 attack to the exclusion of the other evidence against defendant. He spent much of his argument discussing the evidence that supported the charges against defendant. During this discussion, which covers nine pages of transcript, the prosecutor briefly noted two similarities between the 2003 incident and the present case. In both cases, defendant and the victims were arguing, and after the attacks, defendant controlled the victims' movements.

Next, the prosecutor explained how and why the jury could consider defendant's prior conduct. He explained the limitations on the jury's use of the evidence. The jury could not convict defendant based only on the priors, but it could use the evidence along with the other evidence to conclude defendant committed the charged domestic violence.

At this point, the prosecutor reviewed the facts of the 2003 attack against Veronica. In the transcript, this discussion covers only four paragraphs. After that brief summary of the event and its similarities to the charged offense, the prosecutor focused a lengthy discussion on *Veronica* and, in light of the expert testimony, why she testified as she did.

The prosecutor continued by discussing the 2011 and 2014 uncharged acts. He rebutted defendant's denials of those crimes, and he reminded the jury it could consider the prior acts to decide whether defendant was inclined to commit the charged crime.

The prosecutor next discussed how the jury could consider the uncharged acts, without specifying any of them, to decide defendant's intent in the charged offense. He reviewed the expert's testimony, and he concluded this discussion by saying the jury could rely on the three uncharged acts and the other evidence to find that defendant committed the charged act. The rest of his argument, some eight pages of transcript, addressed the remaining elements of the offense, rebutted defendant's testimony, and asked the jury to find the defendant guilty.

Defendant did not suffer prejudice from the prosecutor's argument. When discussing the uncharged acts, the prosecutor did not focus exclusively or excessively on the 2003 attack. His emphasis was on how the three uncharged acts showed defendant's propensity to commit domestic violence. Had the prosecutor not discussed the 2003 attack, he still would have discussed the 2011 and 2014 attacks and emphasized their showing of defendant's propensity and intent. There is no reasonable probability the jury would have returned a more favorable verdict had the prosecutor not discussed the 2003 attack.

II

Instruction on the 2003 Uncharged Offense

Defendant contends the trial court erred by misstating the evidence in an oral instruction. Instructing on the uncharged acts, the court told the jury that defendant's 2003 attack against Veronica resulted in a conviction, but evidence and argument indicated the 2003 conviction was based on a different incident of domestic violence which defendant committed against Veronica in 2002. The prosecutor compounded the error during closing argument by telling the jury that defendant was convicted for the 2003 conduct. Defendant did not object to the court's instruction. Because the error did not affect defendant's substantial rights, he has forfeited the claim.

A. *Background*

A distinction between a 2002 act and the 2003 act was not clearly maintained at trial. When the prosecutor moved in limine to introduce evidence of defendant's prior acts, he explained there were two incidents involving Veronica; one occurred in 2002, the other in 2003. Both were charged in the same complaint, but as part of a plea, the charge for the 2003 incident was dismissed and defendant pleaded to the 2002 incident. The prosecutor sought to introduce the 2002 conviction and the 2003 conduct. He would

present the 2002 conviction by certified conviction, and Veronica would testify to the 2003 incident.

In his opening statement, the prosecutor said the jury would hear of defendant's conviction for the 2002 incident against Veronica and, in addition, of defendant battering Veronica again. Veronica, however, could not recall the 2003 incident other than defendant taking her car. She did acknowledge that defendant was convicted for conduct she "described to officers in 2003" and "where [she was a] victim." She admitted she was present and testified at the preliminary hearing in the matter. But it was Deputy Rivera who provided the details of the 2003 incident.

Ultimately, the parties stipulated that defendant was convicted in 2003 for domestic violence against Veronica, and that Veronica testified at the preliminary hearing for that matter. No evidence indicated the conviction was for a 2002 incident. The prosecutor, however, later explained to the court that the stipulation replaced introducing the record of conviction.

Defendant testified about the 2003 incident. He denied choking Veronica, giving her CPR, or calling her names. He said they argued that day over whether she would take him to work. He picked up a small wooden bat while they talked for no apparent purpose. They both got in her car, and she drove to her workplace without dropping him off at his. He grabbed the keys, she got out, and he drove to his work.

After his preliminary hearing, he pleaded to a deal where, in his words, "all the things she said with the bat and choking all that, there was – there was – based on the fact that there was no evidence of no choking or anything or me striking her with a bat, they dismissed all that and just stuck me with the regular domestic violence, and they gave me the low term . . . ." Neither defense counsel nor the prosecutor asked defendant about a 2002 incident.

The court used CALCRIM No. 375 to instruct the jury regarding the uncharged acts, but, when it read the instruction to the jury, it altered the language in the

instruction's opening paragraph to state defendant was convicted on the 2003 incident. Defendant challenges this alteration. As submitted to the jury in written form, CALCRIM No. 375 begins by stating: "The People presented evidence that the defendant committed other offenses that were not charged in this case, specifically that defendant committed acts of domestic violence in 2003, 2011, and 2014." The court, however, stated the instruction to the jury as follows: "The People presented evidence, ladies and gentlemen, that the defendant committed other offenses that were not charged in this case. And I'm talking about the *crimes charged that he was convicted of in 2003*, 2011 and 2014." (Italics added.) Defendant did not object to the court's oral instruction.

During his closing argument, the prosecutor linked the stipulation to the 2003 incident. Discussing the instruction on uncharged acts, he said the jury already knew defendant committed the uncharged domestic violence in 2003 because the parties had stipulated that defendant was charged and convicted of domestic violence.

Defendant argues the court's misstatement in the oral instruction was prejudicial error. He claims it mislead the jurors to believe defendant was convicted for the 2003 incident. Had the jury been instructed properly, there was a reasonable likelihood one juror may have concluded defendant did not engage in the 2003 incident.

B. *Analysis*

" 'Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights. [Citations.] The question is whether the error resulted in a miscarriage of justice under *People v. Watson,* [*supra,*] 46 Cal.2d 818. [Citation.]' [Citation.]" (*People v. McGehee* (2016) 246 Cal.App.4th 1190, 1203.) Under *Watson,* defendant must show it is reasonably probable he would have received a more favorable verdict had the error not occurred. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

Defendant has not shown prejudicial error. "The risk of a discrepancy between the orally delivered and the written instructions exists in every trial, and verdicts are not undermined by the mere fact the trial court misspoke. 'We of course presume "that jurors understand and follow the court's instructions." [Citation.] This presumption includes the written instructions. [Citation.] To the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control.' (*People v. Wilson* [(2008) 44 Cal.4th 758,] 803.)" (*People v. Mills* (2010) 48 Cal.4th 158, 200-201.) The jury was given the correctly worded instruction in written form and instructed to consider only "the final version of the instructions" given it in writing. Because we give precedence to the written instructions, we find no reversible error.

Moreover, as we have already concluded there is no reasonable probability defendant would have obtained a more favorable verdict had the court excluded evidence of the 2003 assault, the same conclusion holds true had the court not stated the 2003 incident resulted in a conviction. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) Had the court not made the statement, it still correctly instructed on defendant's 2011 and 2014 convictions for domestic violence and the 2003 incident and on how the jury could use that evidence to establish defendant's propensity for domestic violence.

In addition, defense counsel minimized the impact of the prior convictions in her closing argument. She stated that "having a conviction does not mean that [the prosecutor] has proved the underlying conducts. Those are two separate things. Picking up a conviction and the underlying conduct that led to the conviction. Because he has to prove the conduct. [¶] For you to even consider it, he has to prove the conduct by a preponderance of the evidence . . . "

Because it is not reasonably probable that defendant would have received a more favorable verdict had the trial court not said the 2003 conduct resulted in a conviction,

defendant cannot show the error affected his substantial rights. Accordingly, he has forfeited his contention against the court's oral instruction.

III

Prosecutorial Misconduct and Ineffective Assistance

Like the previous claim, defendant contends the prosecutor committed misconduct when he linked the stipulation of convictions to the 2003 incident. Defendant concedes he forfeits this claim because his trial counsel did not object to the prosecutor's comment. He nevertheless argues the failure to object constituted ineffective assistance of counsel.

Because the *Watson* standard of prejudicial error which we have already applied "is substantially the same as the prejudice prong of *Strickland v. Washington* (1984) 466 U.S. 668 [80 L.Ed.2d 674] (defining prejudice as the reasonable probability of a result more favorable to defendant), we need not consider this claim. (See *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050 [comparing *Watson* standard to *Strickland* standard].)" (*People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1407, fn. 4.)

IV

Prison Priors

The trial court refused to strike any of the four prison priors. After the prosecution requested the maximum sentence, including a year imprisonment for each prior, the court stated, "The only thing I would have to think about, which I was thinking about, is whether or not I have the ability to strike the punishment for one or more of those priors. But I'm not going to do that." The court imposed the maximum sentence. It noted defendant's extraordinary number of contacts with law enforcement, his record of going in and out of prison, and the probation report's list of aggravating factors.

Defendant claims the court's statement quoted above shows the court did not understand it had the discretion to strike the priors. Its reliance on aggravating factors

should not have factored into a determination regarding striking the priors. The court may also have been under the misapprehension that one of the priors was for the 2003 incident for which he was not convicted. Defendant asks us to remand so the trial court can exercise its discretion on the prison priors. We deny his request.

"Penal Code section 1385 allows a judge the discretion to dismiss or strike a sentencing enhancement, or strike the additional punishment for the enhancement, in furtherance of justice. (Pen. Code, § 1385, subd. (a), (c)(1).) A trial court's 'refusal or failure to dismiss or strike a prior conviction allegation under [Penal Code] section 1385 is subject to review for abuse of discretion.' [Citation.] An abuse of discretion occurs, for example, 'where the trial court was not "aware of its discretion" to dismiss [citation] . . . .' " (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1020.)

The trial court understood it had the discretion to strike a prison prior. It said it was "not going to do that," and then it explained its reasons for not striking a prior. The record shows the court considered striking a prior but chose not to based on defendant's extensive criminal history and his inability to abide by laws when not incarcerated.

Whether the court linked defendant's 2003 conviction to the 2003 incident is irrelevant. A prior prison term enhancement punishes for recidivism no matter what crimes underly defendant's many convictions. (*People v. Gokey* (1998) 62 Cal.App.4th 932, 936.) The court did not abuse its discretion by not striking any of defendant's prison priors.

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

BLEASE, Acting P. J.

RENNER, J.